PP v. SOGAS TRADING

HIGH COURT MALAYA, GEORGETOWN
MOHD RADZI ABDUL HAMID JC
[CRIMINAL REVISION NO: PA-43-16-11-2019]
6 FEBRUARY 2020

CRIMINAL PROCEDURE: *Revision – Revision of conviction and sentence – Application against decision of Sessions Court Judge – Factors to be considered – Failure to appeal against decision – Whether good reasons offered – Whether factor of urgency presented – Whether application amounted to backdoor appeal*

The respondent was charged with an offence under reg. 21(1) of the Control of Supplies Regulations 1974 ('Regulations') and punishable under s. 22(1) of the Control Supplies Act 1961 ('Act'), for being in possession 3906kg of liquefied petroleum gas ('LPG'), in excess quantity of the licensed limit of 1500kg. The respondent pleaded guilty to the charge in the presence of his counsel. The Sessions Court Judge ('SCJ') was satisfied that the respondent understood the nature of the offence and the consequences of his plea and that he desired to unconditionally pleaded guilty to the charge. After having accepted the plea of guilt, the SCJ amended the charge to effectively reduce the excess quantity of the LPG in the charge to only 40kg, based on the report from the Chemistry Department. Notwithstanding the respondent's admission to the facts of the case that the respondent was in possession of 3906kg of LPG more than the licensed limit of 1500kg, the SCJ held that since only 40kg of the seized LPG were proven, the plea of guilt could only be for the proven quantity of the LPG. As a consequence, the respondent was sentenced to a payment of RM5,000 fine and in default, two weeks imprisonment and forfeiture of the three LPG cylinders. Dissatisfied, the prosecution ('applicant') sought the court's powers of revision with regards to the conviction and sentence passed by the SCJ.

Held (dismissing application):

(1) The court will generally exercise its revisionary powers where the lower courts fails to comply with the provisions of the law, the decision is grossly erroneous, the findings of fact are not supported by evidence, material evidence of the parties are not considered, there has been an error of law or procedure and where the revision is demanded in the interest of public interest. The primary objective of a revision is to correct a miscarriage of justice which has affected the applicant and the High Court's powers of revision are to be exercised sparingly and judiciously. (para 17)

(2) The application for revision must be done at the first possible moment and not after other methods of procedure have been unsuccessfully adopted. When an applicant neglects to file an appeal against an appealable decision, the applicant cannot use the High Court's powers of revision as a back-door appeal. It was incumbent on the applicant to provide very good reasons why an appeal was not filed. If the appeal was restricted because the applicant is out of time, the applicant must show evidence that an application for an extension of time to file the appeal was made. (paras 18 & 21)

(3) The reasons offered by the applicant that the applicant had changed its decision regarding the appeal was not a good reason. If in the opinion of the applicant, the decision of the SCJ was bad in law, then an appeal should have been filed immediately. By taking an affirmative decision to not file an appeal, the applicant was deemed to have accepted the decision. Notwithstanding that time for filing an appeal had lapsed at the time the applicant changed its mind, an application for an extension of time should be first attempted and exhausted. The applicant could not, without good reasons, side step that procedure and come directly to the court with the application. (para 23)

(4) Although an applicant is not estopped from filing an application for revision in preference to an appeal, such a step is usually taken when the issue that is to be adjudicated upon is one that demands urgency due to a huge public interest or outcry in the matter. No such factor of urgency was presented for this application. The application, which was made four months after the decision of the SCJ, was an attempt to gain a back door access to the court's powers of revision and in that process expected the court to cater to the applicant's whims who initially decided not to appeal against the decision f the SCJ and later changed its mind. The court thus decided not to exercise its powers to review the decision of the SCJ. (paras 24 & 25)

Case(s) referred to:

Dorai Manickam Alias Davis v. Rex [1936] 1 LNS 12 HC ***(refd)***
Eng Song Hai v. PP [1953] 1 LNS 23 HC ***(refd)***
Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur [1995] 2 CLJ 209 CA ***(refd)***
Muhamad Nuzul Ikhram Nurallail & Ors v. PP [2018] MLJU 256 ***(refd)***
Muzammil Izat Hashim v. PP [2009] 2 CLJ 354 CA ***(refd)***
Norshaharin v. PP [2002] 5 CLJ Supp 492 HC ***(refd)***
Ong Seh Sen v. PP [2010] 7 CLJ 220 HC ***(refd)***
PP v. Rozita Mohamad Ali [2018] 9 CLJ 265 HC ***(refd)***
Tan Lay Chen v. PP [2000] 4 CLJ 492 HC ***(refd)***

Legislation referred to:
Control of Supplies Act 1961, s. 22(1)
Control of Supplies Regulations 1974, regs. 10(1), 21(1)
Courts of Judicature Act 1964, s. 31
Criminal Procedure Code, ss. 51, 325

For the applicant - Nur Azureen Zainalkefli; DPP
For the respondent - Mohd Khairul Fairuz Rahman; M/s Shaiful Rahman, Hajar & Co

[Editor's note: Appeal from Sessions Court; Criminal Trial No: PA-63-43-06-2019]

Reported by S Barathi

JUDGMENT

Mohd Radzi Abdul Hamid JC:

Preface

[1] By a letter dated 13 November 2019 the prosecution wrote to this court seeking this court's powers of revision with regards to the conviction and sentence that was passed by the Sessions Court on the respondent ("application").

Background

[2] The respondent was charged with an offence under reg. 21(1) of the Control of Supplies Regulations 1974 ("Regulations") and punishable under s. 22(1) of the Control of Supplies Act 1961 ("Act").

[3] The charge read as follows ("charge"):

> Bahawa kamu pada 28 September 2017, lebih kurang jam 10.45 pagi di premis Sogas Trading beralamat No. Lot 20034, Mukim 11, Kampung Bukit, 11900 Bayan Lepas di dalam Daerah Barat Daya dalam Negeri Pulau Pinang sebagai seorang Pemegang Lesen Runcit (No. KR 06273) Barang-Barang Kawalan Berjadual iaitu Gas Petroleum Cecair dengan Had Kuantiti sebanyak 1500 kilogram telah didapati memiliki sebanyak 3906 kilogram Gas Petroleum Cecair melebihi had kuantiti yang dinyatakan di dalam lesen yang mana telah melanggar Peraturan 10(1) Peraturan-Peraturan Kawalan Bekalan 1974 dan oleh yang demikian satu kesalahan di bawah Peraturan 21(1) Peraturan-Peraturan Kawalan Bekalan 1974 dan boleh dihukum di bawah Seksyen 22(1) Akta Kawalan Bekalan 1961.

[4] Regulations 10(1) and 21(1) of the Regulations read as follows:

> 10. (1) A retailer shall not have in his possession or under his custody or control at any one time more than such quantity of any scheduled article as may be specified in the licence.
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> 21. (1) Any person who contravenes or fails to comply with, any provision of these Regulations, or any direction given under these Regulations, or the terms and conditions of any licence, written authority or permit granted, issued or renewed under these Regulations, shall be guilty of an offence.

[5] Section 22(1) of the Act read as follows:

> 22. Penalties
>
> (1) Any person, other than a body corporate, but including a director or officer of a body corporate, who commits an offence against this Act shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding three years or to both, and for a second or subsequent offence, to a fine not exceeding three million ringgit or to imprisonment for a term not exceeding five years or to both.

Proceedings Before The Sessions Court

[6] On 18 July 2019 the respondent had pleaded guilty to the said charge in presence of his counsel. Based on the notes of proceedings, the learned Sessions Court Judge was satisfied that the respondent understood the nature of the offence and the consequences of his plea and that he desired to unconditionally plead guilty to the charge.

[7] There were 16 exhibits tendered as evidence including the facts of the case (exh. P1), police report (exh. P2), photographs of where the offending items were seized (exh. P6 A-1) and chemist report (exh. P13). The respondent admitted to the facts of the case and then after the learned Sessions Court Judge recorded the respondent's plea of guilt.

[8] What transpired after the learned Sessions Court Judge recorded the plea of guilt serves as the basis for this application.

[9] After the plea of guilt was accepted and recorded, the learned Sessions Court Judge then amended the charge. The amended charge ("amended charge") read as follows:

> Bahawa kamu pada 28 September 2017, lebih kurang jam 10.45 pagi di premis Sogas Trading beralamat No. Lot 20034, Mukim 11, Kampung Bukit, 11900 Bayan Lepas di dalam Daerah Barat Daya dalam Negeri Pulau Pinang sebagai seorang Pemegang Lesen Runcit (No. KR 06273) Barang-Barang Kawalan Berjadual iaitu Gas Petroleum Cecair dengan Had Kuantiti sebanyak 1500 kilogram telah didapati memiliki sebanyak 1540 kilogram Gas Petroleum Cecair yang mana sebanyak 40 kilogram Gas Petroleum Cecair melebihi had kuantiti yang dinyatakan di dalam lesen yang mana telah melanggar Peraturan 10(1) Peraturan-Peraturan Kawalan Bekalan 1974 dan oleh yang demikian satu kesalahan di bawah Peraturan 21(1) Peraturan-Peraturan Kawalan Bekalan 1974 dan boleh dihukum di bawah Seksyen 22(1) Akta Kawalan Bekalan 1961.

[10] The amended charge effectively reduced the excess quantity of the liquefied petroleum Gas ("LPG") to only 40kg compared to an excess of 3906kg under the charge. Reading the minutes of proceedings before the Sessions Court it appears that the learned Sessions Court Judge arrived at that decision based on the evidence of exh. P13 that is the report from the

chemistry department. That report stated that only three LPG cylinders out of 391 cylinders that were found and seized from the respondent's premises were tested for its contents. Notwithstanding the respondent's admission to the facts of the case as in exh. P1 that the respondent was in possession of 3906kg of LPG more than the licensed limit of 1500kg, the learned Sessions Court Judge held that since only 40kg of the seized LPG were proven *via* exh. P13 then the plea of guilt can only be for the proven quantity of the LPG. As a consequence, the respondent was sentenced to a payment of RM5,000 fine, in default, two weeks imprisonment and forfeiture of the three LPG cylinders.

The Application For Revision

[11] The applicant was aggrieved by that decision and consequently filed this application.

[12] It is the applicant's complaint that the learned Sessions Court Judge had erred when he disregarded the respondent's admission to the facts of the case as appearing in exh. P1 which forms the basis for the charge. It is the applicant's contention that once the respondent admitted to the charge and the facts of the case the prosecution was not burdened with proving that all the cylinders contained LPG. The applicant relies on the case of *Tan Lay Chen v. PP* [2000] 4 CLJ 492; [2001] 1 MLJ 135 where it was held that following a plea of guilt the prosecution is only required to provide a summary of the facts of the case and that did not require the case to be proved by calling of evidence (see also regarding this point the cases of *Eng Song Hai v. PP* [1953] 1 LNS 23; [1954] MLJ 38 and *Norshaharin v. PP* [2002] 5 CLJ 492).

[13] It is the applicant's further contention that as a result of that error, the sentence passed against the respondent was manifestly inadequate and failed to take into account public interest in ensuring that a license holder conducts his business in accordance with the expressed provisions of the law and the license.

[14] It would appear therefore, based on that contention there is a valid complaint against the decision of the learned Sessions Court Judge. However, in making this application the applicant is faced with a major obstacle before it can move this court to exercise its powers of revision. That obstacle is in the form of the prosecution's failure to file an appeal against the decision of the learned Sessions Court Judge when it was aggrieved by that decision. The decision was delivered on 18 July 2019 and no notice of appeal was filed. Then on the 13 November 2019 this application was made. No explanation was offered in the application as to why an appeal was not filed.

[15] On the hearing of this application, this court questioned the Deputy Public Prosecutor on why an appeal was not filed and her answer was that initially there was an instruction not to file an appeal but the applicant then changed its decision following a review of similar decisions by other courts. By the time the applicant changed its decision the time limit for filing an appeal had lapsed and consequently this application was then made. However, when asked by this court why an application for an extension of time was not made first learned Deputy Public Prosecutor stated that the instruction she received was to file this application.

Power Of Revision

[16] The powers of revision by the High Court are found in s. 31 of the Courts of Judicature Act 1964 and s. 325 of the Criminal Procedure Code:

> Courts Of Judicature Act
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> 31. Revision of criminal proceedings of subordinate courts
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> The High Court may exercise powers of revision in respect of criminal proceedings and matters in subordinate courts in accordance with any law for the time being in force relating to criminal procedure.
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> Criminal Procedure Code
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> 325. Powers of Judge on revision
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> (1) A Judge may, in any case the record of the proceedings of which has been called for by himself or which otherwise comes to his knowledge, in his discretion, exercise any of the powers conferred by sections 311, 315, 316 and 317 of this Code.
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> (2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence.
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> (3) Nothing in this section shall be deemed to authorise a Judge to convert a finding of acquittal into one of conviction.

[17] It is well established law that the court will generally exercise its revisionary powers where the lower court fails to comply with the provisions of the law, the decision is grossly erroneous, the findings of fact are not supported by evidence, material evidence of the parties are not considered, there has been an error of law or procedure and where the revision is demanded in the interest of public interest. The primary objective of a revision is to correct a miscarriage of justice which has affected the applicant and the High Court's powers of revision are to be exercised sparingly and judiciously.

[18] The application for revision must be done at the first possible moment and not after other methods of procedure have been unsuccessfully adopted (*Dorai Manickam Alias Davis v. Rex* [1936] 1 LNS 12; [1936] 1 MLJ 209). As

also stated in *Dorai Manickam*'s (*supra*) case, where an applicant has had the opportunity to appeal but neglects to do so, the court should not exercise its powers of revision unless there are very good reasons for that neglect:

> It is not desirable or possible to lay down hard and fast rules as to when this Court will or will not exercise its powers of revision under section 312A of the Code. Each case must be decided according to its own circumstances. It may, however, be laid down as a broad and general rule that where a party to criminal proceedings has had the opportunity to appeal under section 293 or section 295 of the Code but neglects, without very good reasons, so to do he will not be allowed to invoke the provisions of section 312A and, moreover, that where it is proper that application be made to the Court to exercise its powers under that section the application should be made at the first possible moment and not merely as a forlorn hope after other methods of procedure have been unsuccessfully adopted.

[19] The decision in *Dorai Manickam* (*supra*) was quoted with approval by the Court of Appeal in *Mohd Dalhar Redzwan & Anor v. Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209 where Gopal Sri Ram JCA said:

> The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the decision complained of is appealable and no appeal has been lodged: *Dorai Manickam v. R* [1936] MLJ 261.

[20] Later, in the case of *Muzammil Izat Hashim v. PP* [2009] 2 CLJ 354 the same court had occasion to consider the issue of whether the appellant can seek the revisionary powers of the High Court when the appellant failed to appeal against an order made by the Sessions Court under s. 51 of the Criminal Procedure Code. In dismissing the appeal Hasan Lah JCA stated the following:

> [8] In his judgment the learned High Court Judge referred to and relied on the decision of the Supreme Court in *PP v. Raymond Chia Kim Chwee & Anor* [1985] 2 MLJ 436 where it was held *inter alia* that a decision or order made under s. 51 of the Code is a final order in the sense that it is final in its effect and therefore appealable under s. 307 of the Code. The other case referred to by the learned High Court Judge in his judgment is *Dorai Manickam v. R* [1936] MLJ 261 where it was held that where a party to criminal proceedings who has had the opportunity to appeal neglects, without very good reasons, so to do, he will not be allowed to call in aid the High Court's revisionary powers.
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> [12] Learned counsel for the appellant also submitted that the principle of law stated in *Dorai Manickam*'s case is a bad law because the High Court is conferred with extensive powers of revision in criminal proceedings under s. 323 of the Code and s. 35 of the Courts of

A Judicature Act 1964 and alternatively he submitted that *Dorai Manickam*'s case does not set out that principle of law at all. We found no merit in that argument. Suffice to say that it has been accepted as settled law that except for very good reasons the High Court should not exercise its revisionary powers when a decision complained of is appealable and no appeal has been lodged. In *Mohd Dalhar Redzwan & Anor v. Datuk Bandar,* B *Dewan Bandaraya Kuala Lumpur* [1995] 2 CLJ 209 at p. 219 Gopal Sri Ram JCA said:

> The second principle of settled law is that, save in exceptional cases and for very good reasons, there can be no resort had by a party to the revisionary jurisdiction of the High Court when the C decision complained of is appealable and no appeal has been lodged. *Dorai Manickam v. R* [1936] MLJ 261.

[21] Therefore, when an applicant neglects to file an appeal against an appealable decision the applicant cannot use the High Court's powers of revision as a back door appeal (see *Ong Seh Sen v. PP* [2010] 7 CLJ 220). It D is incumbent on the applicant to provide to the court very good reasons why an appeal was not filed. If the appeal was restricted because the applicant was out of time, the applicant must show evidence that an application for an extension of time to file the appeal was made. In the recent decision of *Muhamad Nuzul Ikhram Nurallail & Ors v. PP* [2018] MLJU 256 the High E Court dismissed an application for revision when the applicant failed to file an appeal against an appealable decision. The court held as follows:

> [29] The learned SCJ cannot of course be requested at this point of time to produce his grounds of judgement in the absence of an appeal lodged within the time permitted by law or where an application has been made F and allowed to extend the time for filing of the appeal with compelling reasons being furnished. There was however no such application made here.
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> [30] It is appropriate at this juncture to reemphasise the point that an application for revision should not be resorted to so as to circumvent the necessity of filing an appeal or by attempting to employ the procedure of G revision so as to effectively grant the applicant a "second bite of the cherry" so to speak, where the time limited for filing of an appeal has expired and no application made for extension of time. The court should therefore draw a distinction and be conscious of the difference between an appeal and a revision.

H **An Evaluation Of This Application**

[22] Based upon the principles of law stated above, it is clear that the applicant must provide very good reasons as to why the appeal was not filed and why no extension of time was filed. Only when such reasons are acceptable would then this court be moved to consider the merits of the I application.

[23] After hearing the learned Deputy Prosecutor, this court finds that no satisfactory reasons have been offered. This court reiterates that the law and procedures regarding filing of appeals must be complied with. The reasons offered by the learned Deputy Public Prosecutor that the applicant had changed its decision regarding the appeal is not a good reason. It is expected that the applicant would have fully appraised the soundness of the learned Sessions Court Judge's decision soonest after the decision is made. If in the opinion of the applicant the decision of the learned Sessions Court Judge was bad in law then an appeal should have been filed immediately. By taking an affirmative decision to not file an appeal, then the applicant is deemed to have accepted the decision. Notwithstanding that time for filing an appeal may have lapsed by the time the applicant changed its mind, an application for an extension of time should be first attempted and exhausted. The applicant cannot without good reasons sidestep that procedure and come directly to this court with the application.

[24] Although an applicant is not estopped from filing an application for revision in preference to an appeal such a step is usually taken when the issue that is to be adjudicated upon is one that demands urgency due to a huge public interest or outcry in the matter (see *PP v. Rozita Mohamad Ali* [2018] 9 CLJ 265; [2018] AMR 843). No such factor of urgency was presented to this court for this application. This application came four months after the decision of the learned Sessions Court Judge was made. This court therefore views this application as an attempt to gain a back door access to this court's powers of revision and in that process expecting that this court caters to the applicant's whims who initially decided to not appeal against the decision of the learned Sessions Court Judge and then later changed its mind. Such an attempt is not welcomed.

Decision

[25] Based on the reasons stated above, this court decides to not exercise its powers to review the decision of the learned SC Judge.